In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 7843

WILLIAM R. MACKLIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Brief

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

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STATEMENT OF THE CASE

Defendant William R. Macklin was indicted at Seattle, December 8, 1934, for a violation of Sections 404 and 1186 of Title 26 U. S. C. A. It becomes important to study the language of the two counts of the indictment with relation to one of the assignments of error. Therefore we present the full text of the two counts omitting captions and merely formal parts.

Count I charged a violation of Section 404 of Title 26 U. S. C. A. (R. S. 3296).

COUNT I.

That WILLIAM R. MACKLIN, whose true Christian name is to the Grand Jurors unknown, on or about the sixteenth day of July, in the year of Our Lord one thousand nine hundred thirty-four, at the City of Port Angeles, in the Northern Division of the Western District of Washington, within the jurisdiction of this Court, and within the Internal Revenue Collection District of Washington, then and there being, did then and there knowingly, wilfully, unlawfully and feloniously remove and aid and abet in the removal of approximately three (3) gallons of moonshine whiskey, on which the tax due the Government of the United States had not then and there been paid, to those certain premises located at Port Angeles, Washington, known as 424 East 11th Street, a place other than a bonded warehouse provided by law, and did then and there conceal, and aid in the concealment of the said moonshine whiskey so removed; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count II charged a violation of Section 1181 of Title 26 U. S. C. A. (R. S. 3450) (Tr. 3).

COUNT II.

That WILLIAM R. MACKLIN, whose true and full name is to the grand jurors unknown, on or about the sixteenth day of July, in the year of our Lord, one thousand nine hundred thirty-

> four, at the City of Port Angeles, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, then and there being, (3) did then and there knowingly, wilfully, unlawfully and feloniously remove, deposit and conceal, with intent to defraud the United States of the internal revenue taxes due thereon as fixed by law, at those certain premises known as, to-wit: 424 East 11th Street, at the City of Port Angeles, Washington, to-wit: three (3) gallons of moonshine whiskey; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

See Tr. p.p. 2, 3, and 4.

Defendant Macklin entered a plea of "Not guilty" to each count. See Tr. p.p. 4 and 5.

The case was called for trial in the United States District Court at Seattle before the Honorable John W. Bowen and a jury on March 27, 1935. Later on said day the jury returned a verdict of guilty as charged in Count I, and not guilty as charged in Count II. Defendant's counsel upon the reading and entry of the verdict moved immediately in open court for a new trial and in arrest of judgment. Later within the time allowed therefor defendant served and filed his written motions. (Tr. 6-7).

The evidence at the trial showed that on July 16, 1934, Clyde J. Shaw and C. J. Gibbs, United States Revenue officers, in a parked automobile near the

alley in the rear of 424 East 11th Street, in Port Angeles, Washington, observed two automobiles, one following the other, to enter the alley at the rear of the said premises. The first car which entered the alley was driven upon the said premises, followed by the defendant Macklin who was driving a 1933 Chevrolet Automobile. These two officers in their parked car were watching for persons who they had reason to believe, were expected to pass them on the road in the vicinity of said alley. When they saw the two automobiles pass their car and enter the alley, they followed closely behind. As the two automobiles came to a stop at the premises of 424 East 11th Street, the officers jumped out of their car and caught Macklin as he was leaving his car carrying a carton containing empty one-gallon containers. They looked into the defendant's automobile and saw some other cartons and arrested him in the belief that he was violating the liquor laws. After they had placed him under arrest, they searched his car and found five or six empty one-gallon jugs each of which was made of white glass. They also found three full one-gallon glass jugs each containing whiskey. See Tr. 23-27. In support of these statements, Mr. Shaw produced and identified a one-gallon glass container which was full of what he said was alcohol whiskey. We quote from the Bill of Exceptions as follows:

> "This one-gallon container bore no tax stamp receipts, mark or label of any kind except the Exhibit mark placed thereon after defendant Macklin's arrest. The said three one-gallon containers were made of white glass and when seized bore no identifying mark of any kind thereon. There was no mark, tag, label, or anything upon the said container to indicate that the tax had or had not been paid on the contents. Neither the containers nor the cartons bore tax stamps or labels of any kind at the time of the arrest." (Tr. 25.)

This officer testified that he asked Mr. Macklin, whose liquor it was and that Macklin answered that it was his. He then asked Macklin what kind of liquor it was and according to the officers statements, Macklin replied that it was alcohol whiskey. Mr. Shaw further testified that there were two other one-gallon containers each of which was full of the same kind of liquor. We quote again from the Bill of Exceptions:

> "Each container was without any label or tag or other mark." (Tr. 26.)

The witness was asked by defendant's attorneys, in substance the following questions:

> "Question: When you were waiting in the vicinity of 424 East 11th Street, were you waiting for Mr. Macklin?"

Witness answered "No."

> "Question: Then Mr. Macklin was not the man whom you suspected and he was not the man whom you were waiting for?"

Witness replied in the negative. (Tr. 26-27.)

Mr. Shaw stated further that he followed the Macklin car because he was watching all cars passing in the vicinity. That he had received information that liquor would be transported to the place in question and that when the two cars came along and entered the alley he thought it best to investigate.

C. J. Gibbs, the other Revenue officer who accompanied Mr. Shaw to the premises and made the arrest, testified in substance the same as his brother officer Shaw. (Tr. 27-28.)

Messrs. Shaw and Gibbs seized the three one-gallon containers and took the same to Seattle to use as evidence against Macklin.

The Government called two other witnesses, from its alcohol Tax Unit Division of the Bureau of Internal Revenue at Seattle, to testify that they had had the custody of seized liquor from the time it was delivered dence at the trial. They also testified that the three one-gallon jugs each of which was filled with liquor bore no stamp marks, tax labels or notices of any kind upon them, other than the identifying labels placed on the same by the Internal Revenue Bureau after Macklin's arrest. (Tr. 28-29.)

After the Government had rested its case in chief, defendant's counsel moved the court to instruct the

jury to return a verdict of "Not Guilty" upon each count for the reason that there was no evidence of any kind in the record to support the material allegation of each count of the indictment, to the effect that the tax due the United States on said liquor had not been paid.

That inasmuch as only three (3) gallons of liquor were found in Macklin's car, and as each gallon was contained in a one-gallon glass jug, which had no identifying mark label, stamp, or tag of any kind, there was nothing on the jugs which would bear upon the question of whether the tax had or had not been paid. And as there was not a *scintilla* of evidence in the case which in any manner pertained to the question of tax payment, the court should instruct the jury to return a verdict for the defendant. The tax is presumed to have been paid on liquor which is found in a container, jug or vessel of any kind of less than five gallons capacity. That in these circumstances the burden was upon the United States to prove beyond a reasonable doubt that the tax on said liquor had not been paid.

The Court overruled defendant's motion for a directed verdict, whereupon defendant excepted to the refusal of the Court to grant the said motion.

Defendant's counsel then stated to the Court that defendant would offer no evidence, and would decline

to testify in his own behalf. Thereupon defendant again moved for a directed verdict of not guilty upon the same grounds which he had urged in support of the first motion. The Court denied this second motion for a directed verdict to all of which defendant noted an exception.

Arguments of Counsel were then made after which the Court instructed the jury as to the law of the case.

Defendant had requested in writing that the Court give the following instructions, viz:

INSTRUCTION NO. 1.

"I instruct you that where less than five gallons of intoxicating liquor are found in any one container or vessel, and the said container, vessel or receptacle bears no revenue stamp thereupon showing the payment of tax, the law presumes that the tax was paid and it then becomes the duty of the government to prove beyond every reasonable doubt that the tax upon said liquor had not been paid. Proof of non-payment must appear in the case without regard to any stamp on the bottle, jug or container.

INSTRUCTION NO. II.

"I instruct you to return a verdict of not guilty in this case for the reason that there is no evidence in this case that the tax on this liquor has not been paid. (34)

INSTRUCTION NO. III.

"I instruct you that upon the Government's case which is now closed it is your duty to return a verdict of not guilty to each of the counts of

> this indictment. You will remain in your jury box and your foreman will sign the verdict of not guilty."

That the court then and there noted defendant's exception to its refusal to so instruct and allowed the same. None of these requested instructions were given in the Court's instructions to the jury. (See Court's Instructions, p.p. 30-31.)

That the court then submitted said cause to the jury which after due deliberation returned its verdict of guilty as charged under Count I and not guilty under Count II. Verdict was entered on March 27, 1935. Thereupon on said day defendant moved for a new trial and in arrest of Judgment in substance, to-wit:

> "That there was no evidence to support the allegations of the indictment that the tax had not been paid and that by reason thereof, motions for a directed verdict should have been granted."
>
> "That prejudicial error resulted from the Court's refusal to instruct as requested and that the finding of not guilty under Count II operated as a matter of law to discharge defendant under Count I notwithstanding the verdict." (Tr. p. 7.)

The Court continued the hearing on motion for new trial until April 8th, 1935, and upon said day, again continued said cause until April 15th for hearing the motion, and on said day denied same, and

thereupon the Court imposed judgment and sentence of the Court which is of record in said cause. (Tr. p. 9.)

The Court, after sentence, admitted defendant to bail, pending his appeal. (Tr. p. 10.)

THE POINTS RELIED UPON BY APPELLANT FOR REVERSAL IN HIS NOTICE OF APPEAL (Tr. p. 11) ARE, VIZ:

1. The government failed to offer any evidence in support of either of the counts of the indictment which tended to prove that the tax had not been paid. The case as a whole lacked any evidence of non-payment of the tax. Under Section 266 U. S. C. A., Title 26, (R. S. 3289)

> "All distilled spirits found in any cask or package containing five gallons or more, without having thereon each mark and stamp required therefor by law, shall be forfeited to the United States."

This forfeiture section above cited rests upon Sections 332 and 335 of Title 26 U. S. C. A., being respectively R. S. 3320 and 3323, which require all casks or packages of distilled spirits containing five gallons or more, to be marked, branded and stamped.

From these sections we note that marking, branding and stamping do not apply to containers, jugs, or

receptacles of less than five gallons capacity and hence the forfeiture provisions of Section 266, Title 26, U. S. C. A. (R. S. 3289) do not apply, hence there could be no conviction under either of Sections 404 and/or 1181 of Title 26, U. S. C. A., without proof of the non-payment of the tax. The liquor contained in any receptacle of under five gallons capacity is presumed to have been tax-paid and this presumption casts the burden upon the Government of proving that the liquor tax on less than five gallons in anyone container had not been paid. The motion for a directed verdict should have been granted.

2. The verdict of not guilty on Count II was in legal effect an acquittal of Count I because the same proof was required to support each of the two counts. These two points were urged in a motion in arrest and for a new trial which were by the Court, denied, to which defendant duly excepted.

SPECIFICATIONS OF ERROR (Tr. p. 22)

1. The Court erred in denying defendant's motion for a directed verdict of acquittal submitted

a. At the close of Government's case in chief, and

b. Again when defendant rested, which motions were identical and were based on the absolute failure to prove that the Government tax on said liquor contained in three one-gallon jugs had not been paid.

That defendant then and there noted an exception to the Court's refusal to grant said motion in each instance.

2. The Court erred in refusing to give defendant's requested instructions numbered I to III inclusive, viz:

INSTRUCTION NO. I.

"I instruct you that where less than five gallons of intoxicating liquor are found in any one container or vessel, and the said container, vessel or receptacle bears no revenue stamp thereupon showing the payment of tax, the law presumes that the tax was paid and it then becomes the duty of the government to prove beyond every reasonable doubt that the tax upon said liquor had not been paid. Proof of non-payment must appear in the case without regard to any stamp on the bottle, jug or container."

INSTRUCTION NO. II.

"I instruct you to return a verdict of not guilty in this case for the rason that there is no evidence in this case that the tax on this liquor has not been paid. (34)

INSTRUCTION NO. III.

"I instruct you that upon the Government's case which is now closed it is your duty to return a verdict of not guilty to each of the counts of this indictment. You will remain in your jury box and your foreman will sign the verdict of not guilty."

3. The Court erred in denying defendant's motion for a new trial and in arrest of judgment particularly

on the principal ground that the verdict of the jury in acquitting the defendant on Count II operated as a matter of law to acquit the defendant of Count I because the identical proof required to support Count II was likewise required to support Count I. The crimes charged in the two counts were the same with slight differences in phraseology, and the proof required to support each of the counts was identical as to time, place, person and subject matter. The gist of one was the gist of the other.

ARGUMENT

I. THE MOTIONS FOR A DIRECTED VERDICT OF NOT GUILTY

These motions should have been granted. The failure to direct a verdict of acquittal duly excepted to was reversible error.

The Federal Statutes require spiritous liquor to be marked, branded and stamped with a revenue stamp. This duty is imposed upon a United States Gauger whenever the cask or package contains more than five gallons by Section 332 U. S. C. A., Title 26 (R. S. 3320). Under Section 335 U. S. C. A., Title 26 (R. S. 3323) the law requires every package of spirits filled on the premises of a wholesale liquor dealer

which contains more than five gallons on which the dealer has paid the tax, to be branded, marked and stamped. Non-compliance on the part of the Gauger or Wholesaler is penalized.

It thus appears that all spiritous liquor contained in a receptacle of five gallons capacity or more must be stamped, branded, marked and labeled as required by law; whereas there is no provision of the law with respect to liquor which is contained in a receptacle of less than five gallon capacity. In the case of a receptacle containing five gallons or more, the absence of the gauge mark and tax stamp shows that the legal requirements as to marking and stamping have not been observed. Hence the courts have said that in the event a cask, package or receptacle containing five gallons or more of spirits is not stamped and branded as required by law, there is a *prima facie* case of failure to pay the revenue duty upon said spirits. The burden is then upon the owner or possessor to show that the tax had been paid.

A container or receptacle of less than five gallons capacity and which has no revenue stamp upon it, raises no presumption re the payment of the tax. In these circumstances the burden is upon the Government to

prove non-payment of the tax like any other material allegation of the Indictment.

In fact the non-payment of the tax on the spirits involved in these two counts was the most essential element of the several elements of the offenses charged in the two counts, if indeed there were two distinct offenses charged.

There was a total and complete failure of proof as to the payment or non-payment of the tax due on the liquor mentioned in each count of the indictment. Only three gallons were involved and each gallon was contained within a one-gallon glass jug. Hence, there was no presumption as in the case of a five-gallon or larger container.

Three decisions of the Circuit Court of Appeals support this assertion, and none has been found to the contrary. See *Dukes vs. U. S.*, 275 Fed. 142 (4th C. C. A.). In that case officers went to the residence of the accused and found about three gallons of corn liquor. One of the arresting officers said that he was acquainted with "Blockade Liquor" and that in his opinion the liquor found on defendant's premises was "*Blockade Liquor*". No stamps or marks of any kind were found on the bottles or containers. We quote from the opinion:

> "A package or cask of less capacity than five wine gallons containing distilled spirits was not

required by law to have upon it any stamps, marks, or brands denoting the payment of the tax on the contents. The following sections of the Internal Revenue Laws will throw light upon this subject:

> 'Sec. No. 3289. All distilled spirits found in any cask or package containing five gallons or more, without having thereon each mark and stamp required therefor by law, shall be forfeited to the United States.' Comp. St. 6030."

Section 3320, as amended by the act of July 16, 1892 and as further amended by the act of August 27, 1894 (Comp. St. p. 6102), is in part as follows:

> "Whenever any cask or package, containing five wine gallons or more, is filled for shipment, sale, or delivery on the premises of any rectifier who has paid the special tax required by law, it shall be inspected and gauged by a United States gauger whose duty it shall be to mark and brand the same and place thereon an engraved stamp, which shall state the date when affixed and the number of proof gallons, and shall be in such form as shall be prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury."

Section 3323, R. S., as amended by the act of July 16, 1892 (27 Stat. 200, Comp. St. p. 6104), provides that:

> "Every package of distilled spirits containing five wine gallons or more, filled on the premises of a wholesale liquor dealer, who has paid the special tax required by law, shall

be marked, branded and stamped by such wholesale liquor dealer, in such manner and under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe."

"Taking these sections in connection with the other provisions of the law, and the regulations governing the stamping of original casks and packages of distilled spirits, to the end that they might be removed from the distillery warehouse or the general bonded warehouse in which they were stored, it will be observed, as we have stated above, that no cask or package of less capacity than five wine gallons, containing distilled spirits, required the presence upon it of stamps, marks, or brands to denote the payment of the tax on the contents. The retail liquor dealer was the instrumentality through which distilled spirits, in packages, casks, or vessels holding less than five wine gallons, were distributed to the public for consumption.

In contemplation of law, the retail dealer bought his stock of distilled spirits from distillers, wholesale liquor dealers, or rectifiers, and the spirits were bought in barrels, casks, or packages, bearing the stamps, marks, and brands to evidence the payment of the tax. From these containers the retail dealer dealt out distilled spirits to purchasers in quantities of less than five gallons, as before stated. The law protected the spirits sold by the retailer from seizure or confiscation, unless it was shown that it had been taken from an untaxpaid package. Therefore when distilled spirits were found in a vessel of less capacity than five wine gallons, the law presumed that it was taxpaid, and the burden was upon the party alleging the contrary to prove it,

and in a criminal case to prove it to the satisfaction of a jury beyond a reasonable doubt.

> The nonpayment of the tax is an essential ele- (*now Section 404 of Title 26, U. S. C. A.*)
> ment of the offense denounced in Section 3296, and the burden was upon the government in this case to prove that fact beyond a reasonable doubt, in order to warrant a verdict of conviction. The witness Lockhart testified that he was acquainted with blockade whiskey, and that in his opinion that found in the possession of the defendant was of such character. He did not testify that the species of distilled spirits known as 'Blockade' differed from that on which the tax had been paid in color, flavor, odor, or in any other respect. We do not think that this evidence was sufficient to prove the fact that the distilled spirits found in defendant's possession was illicit." (The italics referring to U. S. C. A. are inserted by ourselves.)

Hester vs. United States (C. C. A. 4th Circuit), 284 Fed. 487. The facts were similar to those of the *Dukes* case. There the amount of liquor found in the possession of the accused was less than five gallons. Defense moved for a directed verdict because of failure of proof to show that the liquor tax on the particular spirits had not been paid. Motion denied and verdict of guilty rendered. As in the *Dukes* case the Government officers testified that the liquor in question was "new corn liquor" "untax-paid liquor—blockade liquor".

Referring to this testimony the Court said:

"This will not suffice to show whether, in dealing with a package of whiskey containing less than five gallons, it was in point of fact tax paid or not. The mere fact that it was new corn whiskey would not show that the tax had not been paid as, perchance it might have come from a registered distillery and bonded warehouse. In this case the spirits covered by the indictment consisted of less than five gallons, namely, a quart, and the defendant is entitled to the benefit of the presumption that the tax had been paid. *The burden was upon the Government to show to the contrary.* If the quantity had been greater than five gallons, the absence of stamps showing payment of the tax would place upon the accused the burden of showing that the tax had been paid. It was incumbent upon the government, in the circumstances of this case, where the tax on the spirits was presumed to have been paid, to establish the contrary by proof to the satisfaction of the jury beyond a reasonable doubt, which we think it utterly failed to do, and hence that the defendant's motion to instruct a verdict in his behalf, should have been sustained. The case, it seems to us, falls strictly wihin the decision of this court in Dukes vs. United States, 275 Fed. 142, where the very question of the sufficiency of the proof of nonpayment of the tax, based upon mere observation of the spirits by witnesses, was involved. The court in that case held, as we hold here, that certainly in a prosecution under this section of the law, where nonpayment of the tax is the essence of the offense, the proof clearly failed to establish such nonpayment, and hence in this case there should be a reversal of the decision of the lower court." Reversed. (Italics ours.)

Mickle vs. United States, 33 Fed. (2d) 684 (C. C. A. 8th). In this case there were six gallons of liquor. The liquor was contained in twelve one-half gallon jars. There was no label, stamp or mark on the jars. Prosecution was based on Section 404 of Title 26, U. S. C. A. (R. S. 3926).

> "The fact that the half-gallon glass jars which the appellant had in his possession did not have on them internal revenue stamps was not sufficient to raise a presumption that the tax had not been paid and shift the burden of proof as to that element of the crimes charged from the government to the appellant. Dukes vs. United States (C. C. A. 4th), 275 F. 142, 146; Hester vs. United States (C. C. A. 4th), 284 F. 487, 488.
>
> Prior to national prohibition it was entirely lawful to have in one's possession and to transport distilled spirits of less than five gallons in a container bearing no stamps. No provision of the law required stamps to be affixed to containers of less than five gallons of distilled spirits. See Sections 266, 332, 335, Title 26, U. S. C. A."

This quoted excerpt which refers to the period before the 18th Amendment became effective, is equally applicable to the present time, now that it has been repealed. So far as the laws of the United States are concerned the possession of liquor in containers of less than five gallons is not unlawful unless the Revenue Tax upon the same has not been paid. If the tax has been paid the liquor becomes entirely lawful. We again quote from the *Mickle vs. U. S., supra*:

> "The fact that in this case the appellant had in his possession more than five gallons of whisky does not affect the situation, since he did not have any one container of more than five gallons. The presumption that the tax has not been paid only arises from the absence of stamps from a container having in it more than five gallons.
>
> Nothing was proved against the appellant except possession and transportation of intoxicating liquor, offenses under the National Prohibition Act for which he might have been prosecuted and of which upon the record here he was clearly guilty. It was entirely within the rights of the appellee to proceed against him under the internal revenue laws, with their heavier penalties, but it then had a heavier burden of proof which here it did not sustain. The appellant was entitled to a directed verdict of not guilty."

These cases establish the contention of appellant that his motion for a directed verdict upon each count of the indictment should have been granted.

II. THE VERDICT OF THE JURY ACQUITTING DEFENDANT OF COUNT II MUST AS A MATTER OF LAW OPERATE TO DISCHARGE DEFENDANT UPON COUNT I

Although the two counts were alleged to be under different sections—*i. e.*, Count I charging a violation of 26 U. S. C. A., Section 404, while Count II charged a violation of Section 1181 of Title 26.

We now set these sections out in parallel columns, viz:

Section 404.	Section 1181.
Whenever any person removes, or aids or abets in the removal of any distilled spirits on which the tax has not been paid, to a place other then the bonded warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of any distilled spirits from any distillery warehouse, or other warehouse for distilled spirits authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than $200 nor more than $5,000, and imprisoned not less than three months nor more than three years. (R. S. Sec. 3296: Mar. 3, 1877, c. 114 Sec. 1, 2, 19, Stat. 393; Aug. 27, 1894, c. 349, Sec. 52, 28 Stat. 565).	This section deals primarily with forfeiture of goods or commodities and also in forfeiture of instruments of carriage or removal. The pertinent parts of this statute insofar as they relate to the offense of the person violating the act are, to-wit: * * * And every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than $500.00. (R. S. Sec. 3450).

Each count charged the offense as committed on July 16, 1934, at Port Angeles. Each states that William R. Macklin did then and there within the Division and District aforesaid knowingly, wilfully, unlawfully, and feloniously,—

Count I	Count II
* * * "remove and aid and abet in the removal of approximately three gallons of moonshine whiskey, on which the tax due the Government of the United States had not then and there been paid, to those certain premises located at Port Angeles, Washington, known as 424 East 11th Street, a place other than a bonded warehouse provided by law and did then and there conceal and aid in the concealment of the said moonshine whiskey so removed contrary to the form of the Statutes, etc."	* * * "remove, deposit and conceal, with intent to defraud the United States of the Internal Revenue taxes due thereon as fixed by law at those certain premises known as 424 East 11th Street at the City of Port Angeles, Washington, to-wit: three gallons of moonshine whiskey contrary to the form of the statute, etc."

* * *

Let us note the points of identity and similarity in the counts. Each offense was alleged to have been committed on July 16, 1934, at Port Angeles, Washington, within the Court's Jurisdiction. Each was confined to one person, William R. Macklin. Each charged a *removal* of three gallons of moonshine

whiskey to the identical premises, 424 East 11th street. So far there is absolute identity. Count I charges that Macklin aided and abetted a removal but the proof was the same under each count. Macklin was the sole and only person involved in the transaction. He was alone. The proof wholly failed to connect the first car and its driver who drove into the alley with Macklin. The government officers offered no testimony as to who the driver was nor as to his mission in the alley or his purpose or reason in going upon the premises. There is absolutely no connection between the driver of the first car, or any other person at the premises, 424 East 11th, and Macklin. So far as that person is concerned he acted lawfully in every way in going into or upon the premises at East 11th Street.

This eliminates the allegation that Mr. Macklin was aiding and abetting some other person in the removal of the whiskey charged in Count I. The proof showed that he had no help or aid from any other person, at least so far as the record goes.

Each of the counts charges concealment as well as removal. In Count II the word "Conceal" is coupled with the words "removed", and "deposit" whereas in Count I the allegation is that defendant took the liquor to a place other than a bonded warehouse "*and*

*did then and there conceal * * * said moonshine whiskey so removed*". The only noticeable difference between the allegations of Count I and Count II is that the premises, 424 East 11th Street, are charged in Count I to be a "*place other than a bonded warehouse*": whereas in Count II the charge is that he removed, deposited and concealed three gallons of moonshine liquor at the "premises known as 424 East 11th Street". There may be some slight technical difference between the counts in this respect. The only other difference is that Count II has the charge "deposit" whereas there is no such term in Count I. In all other respects the counts are the same.

There was, however, but one transaction involved in the two counts of the Indictment. The charge of concealment in each count must be disregarded because there was no evidence of any concealment at the premises, No. 424 East 11th Street. The concealment is not predicated upon having the liquor in the car. The specific charge in each count is that the liquor was concealed at the premises, 424 East 11th Street. Defendant was arrested the moment after stepping from his automobile. He had no chance to conceal the liquor or make any other disposition of it, even if such had been his purpose and intention. Therefore, the only remaining elements of the of-

fense in each count are that he removed three gallons of moonshine whiskey upon which the tax had not been paid to 424 East 11th Street. Thus, we see clearly that there was only one transaction shown by the proof under both counts. The proof necessary to support Count II was necessary to support Count I. In fact there was no evidence in the case to show that the premises 424 East 11th Street was not a bonded warehouse. Nothing was said about whether the said premises were bonded or not bonded. The gist of each count was the removal of three gallons of moonshine whiskey to said premises without having paid to the United States the tax thereon. Therefore, the finding of not guilty under Count I was the legal equivalent to a specific finding that Macklin did not "remove, deposit and conceal" three gallons of moonshine whiskey at the premises, 424 East 11th Street, Port Angeles, with intent to defraud the United States of the Internal Revenue tax due thereon as fixed by law.

The Judges of the C. C. A. for the 3rd circuit in *Hohenadel Brewing Co. vs. U. S.*, 295 Fed. 489, at page 490, held that a verdict on the 7th Count of the Indictment had to find support on evidence different from the evidence offered in support of the first six counts upon which the verdict was "Not Guilty." We quote from the opinion, viz:

> "If the government relies upon the facts charged in the other counts to sustain the verdict of guilty on the seventh count, the judgment cannot stand, for the jury has found as a fact that the company did not commit the acts therein charged and in that case the verdict, as defendant contends, would be 'inexplicable and inconsistent'. Facts that have no legal existence may not support a verdict. *The verdict of guilty on the 7th count must be based on evidence other than that pleaded in support of the first six counts.* Is there such evidence?" Defendant was found guilty of making illegal sales of beer on specific dates in six counts. The jury returned a verdict of guilty on the 7th count." (The italics are ours.)

Another case which clearly states this principle is *Rosenthal vs. United States*, 276 Fed. 714 (9th C. C. A., 1921) in which Judge Ross wrote the opinion. The facts are almost parallel to the case at bar.

The defendant was charged in the first count with having bought and received 39 cases of certain described cigarettes which had theretofore been stolen from a Southern Pacific freight train, while moving in Interstate Commerce well knowing that the cigarettes had been stolen. The second count charged the defendant with having the same cigarettes in his possession. The jury returned a verdict of not guilty as to Count I but guilty as to Count II. Judge Ross speaking for this court said:

"The difficulty is that there was but one transaction involved in the two counts of the indictment, which was based upon the statute mentioned, and, according to the evidence one transaction between the plaintiff in error and the theives. By its verdict upon the first count of the indictment, the jury found that the plaintiff in error neither bought nor received the cigarettes from them with knowledge of the theft and by its verdict upon the second count that the plaintiff in error was at the same time and place in possession of the property with such guilty knowledge. The two findings were thus wholly inconsistent and conflicting. For this reason we feel obliged to reverse the judgment and remand the case for a new trial."

See *Morgan vs. Devine*, 237 U. S. 632 * * * 59 L. Ed. 1153, Sections 1052, 1062, Bishop's Criminal Law 8th Ed. Judgment reversed and case remanded for a new trial." We quote the Supreme Court:

"The test is whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second cannot be maintained; when there could not, it can be. Sec. 1052 Bishop's Criminal Law.

"As to the contention of double jeopardy upon which the petition of habeas corpus is rested in this case, this court has settled that the test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes. Without repeating the discussion, we need but refer to Carter v. McClaughry, 183 U. S. 365, 46 L. Ed. 236, 22

Sup. Ct. Rep. 181; Burton v. United States, 202 U. S. 344, 377, 50 L. Ed. 1057, 1069, 26 Sup. Ct. Rep. 688, 6 Ann. Cas. 362, and the recent case of Gavieres v. United States, 220 U. S. 338, 55 L. Ed. 489, 31 Sup. Ct. Rep. 421."

We need only ask whether the same proof was required to support Mr. Macklin's conviction under Count I as was submitted under Count II. The Government had to prove under Count I that the "three gallons of moonshine" was not tax paid liquor. It had to prove that Macklin removed the non-tax liquor to the premises 424 East 11th Street. It had to prove the identical transaction of Count II in order to convict under Count I. Hence, the acquittal under Count II is a bar to a further prosecution under Count I. The motion in arrest should have been granted. The error is apparent on the face of the record and was subject to dismissal under the motion in arrest. It would serve only to delay and put the defense to further expense only to meet the same contention based upon double jeopardy.

Respectfully submitted,

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